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SUPREME COURT, U.S.

No. 06-737

In the

Supreme Court of the United States

THE ESTATE OF LESLIE HARRISON CLEM, JR.,
Deceased, by and through Administrator,
Leslie Clem, Sr., et al.,

Petitioners,

v.

WESTERN HERITAGE INSURANCE COMPANY,
a foreign insurer,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

HON. HOWARD O. MANN
LAW OFFICES OF HOWARD O. MANN, PSC
104 N. KENTUCKY AVENUE
P.O. DRAWER 1344
CORBIN, KY 40702
(606) 528-0616

HON. MAX D. PICKLESIMER*
333 WEST VINE, SUITE 1640
LEXINGTON, KY 40507
(859) 230-9206

HON. SAMUEL E. DAVIES
230 KNOX STREET
BARBOURVILLE, KY 40906-1428
(606) 546-5196

**Counsel of Record*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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Having read Western's response, we find it difficult to imagine an alternative means (save, of course, a direct admission) by which the insurer could have more clearly confirmed the error below. Indeed, the lack of substance to its response is evident not only in its limited text, but in what is conspicuously absent therefrom, as well. We'll be direct in our reply.

First. Throughout these proceedings, we've asserted that which is fundamental and reflected in the authorities cited: that just as *ordinary* usage recognizes a clear distinction between "*participating in*" an event or activity and merely "*traveling to or from*" it, the former is also ordinarily understood as **ending,** at *least,* when (or where), one has fully exited the identifiable, prescribed boundaries of that event; is merely traveling elsewhere (by whatever means); and with no intention to return. *Nowhere* in the text of Western's brief does the insurer attempt to dispute this, much less offer authority in support.[1]

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[1] Indeed, Western's anemic efforts to distinguish *Glenn Falls vs. Simpson*, 439 S.W.2d 292 (Ark. 1969) and *Town of Surfside vs. Morrison*, 394 So.2nd 530 (Fla.Ct.App. 1981) reveal only a mistaken understanding or refusal to concede the obvious. Again, the departure of the softball player from the field of play in *Morrison* (and with no intention to return and resume a game already concluded) denoted the end of his participation in the contest in question. Likewise, the ruling in *Simpson*, and rendered respecting an injury which at least occurred *within* the boundaries of the golf course, would have obviously been duplicated had those same injuries been sustained after the victim had exited those boundaries (again, with no intention to return) and by *whatever* means. By the same token, just as the ruling in *Twin Cities Fire Ins. Co. vs. Delaware Racing Ass'n.* 848 A.2nd 624 (Del. 2003),

Second. We've likewise urged that which is equally clear from the text of Western's policy and also confirmed in the various authorities cited: that *just as* the insurer's subject exclusion provides it with **uniform** protection respecting *any* injury sustained (by *whatever* means) while "participating in" *any* event, show, contest or the like, this *also* leaves its coverage obligations, extended under its broad insuring clause and respecting *any* injury sustained while merely traveling "to or from" *any* such event, equally and uniformly *unimpaired*. Again, this Court will find *nothing* in Western's offering (much less supporting authority) to the contrary.

Third. Finally, we've merely asserted that which is mandated by the foregoing principles and, again, fully supported by the authorities cited: that accepted rules of construction require Western's exclusion to be construed in a manner which comports with ordinary usage; is amenable to a *consistent* application to the various circumstances to which it is generally addressed (without producing the absurd); *and*, even should those terms be susceptible to a second, *alternative* reading, as well, they are to be construed in a manner most favorable to the insured. *This* (among *other* things), requires event boundaries (*and* mere travel therefrom, with no intent to return) to be accorded equal significance, whether the event is a race, exhibition *or* parade. Further, it is thus *utterly beside the point* if Western (and the Courts

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extends to injuries sustained by a groom riding a racehorse to the barn and following the conclusion of a horse race in which the latter had competed, the *same* result would also obtain in the latter instance if those same, limited duties were instead being performed by the jockey who had also ridden the horse *during* the race. The point, very simply, is that mere similarity and temporal proximity between "participating *in*" and "traveling *from*" an event does *not* transform the latter into the former, and for purposes of a participant exclusion to be narrowly construed.

below) have enunciated what they insist is an alternative, but *broader*, construction of the exclusion, much less one that is both unprecedented *and* facially incapable of consistent application.

To all of this, Western (understandably) offers no direct response, tendering only a personal endorsement of its proposed construction; a recitation of selected excerpts drawn from the opinions below, themselves; and, again, *no* authority endorsing the unprecedented construction in question. Conversely, *nowhere* does the insurer offer authority *or* argument controverting that which it seeks to ignore: the usage *ordinarily* given to the terms of its exclusion, enunciated three paragraphs hereinabove; endorsed by the Kentucky Courts; and underscored by the contrast between its *own* exclusion and that invoked in *American Casualty vs. Krieger*, 181 F.2nd 1113 (9th Cir. 1999). More particularly, *nowhere* does it identify either language in its policy *or* recognized authority which would permit its exclusion to be invoked *here*, but (as exhaustively illustrated by Petitioners, both here and below) remaining clearly *inapplicable* in any *other* comparable instance, i.e., where any *other* event participant is injured after fully exiting the prescribed and identifiable parameters of a given event; is merely traveling elsewhere; and with no intention to return. Indeed, Western's only offering in *this* regard is to deem (without explanation) *any* such parallel circumstance as "far flung".

As should be apparent, however, Western's use of this dismissive description does *not* hinge on whether the travel from the event covers only the distance to a nearby concession stand *or* to one's home, located miles away, any more than it depends on whether a different or *identical* event is involved, or whether the mode of travel, used both during and after the event, is automobile, bicycle or one's lower

extremities. According to Western, *all* such instances have been "flung" too "far". In truth, the *only* operating "principle" at work in Western's transparent efforts to prop up an application of its exclusion, in *this* instance, that would be patently *improper* in any *other* comparable circumstance, is one borrowed directly from "The Three Bears". That is (and according to Western) a nearby concession stand is "too close"; one's home is "too far"; but over a half a football field away, on a different street, open to public traffic and extending in an inconsistent direction, is "*just right*". Thus, what Western offers (both here and below), as a preferred substitute for established authority, *are the teachings of a fairy tale.*

In short, Western has offered *nothing* negating the obvious: that rules of construction require a *consistent* application of it's exclusion, and the construction adopted below is simply *incapable* of being so applied *without* producing the absurd.[2] Having accused *Petitioners* of

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[2] The flaw in Western's construction only becomes more apparent when one considersons the scenario where, say, the sweetheart of one of the students on board accepts an invitation, extended during the vehicle's brief, pre-accident stop on Kimberly Drive, to join the others on the trailer. Under the construction adopted below, one must either (1) classify this additional passenger as a "participant" in the event (even though he or she *hasn't traveled a single inch of the parade's prescribed route)*, or (2) endorse the equally absurd view that as the vehicle and its passengers travel further away from the parade terminus, the *others* on board continue to "participate in" the parade left behind, while the *additional* passenger does *not*, and while *all of them* traverse the same path by the same means. *This* again illustrates why mere similarity and temporal proximity cannot be used to transform "travel from" an event into "participation"therein, *as well as* the the absurdity that results from applying the selected construction in a *consistent* manner.

resorting to unsupported "rhetoric", it is *Western* which has offered only a small collection of unsupportable, omnibus proclamations. These, in part, consist of it's claim that the rulings below "followed applicable state law", but undercut by it's conspicuous *inability* to cite a single authority in support or in conflict with those cited by Petitioners. The balance (apart from those to be discussed in the following section below) is comprised of it's insistence that "logical reasoning" supports a selected construction both at odds with an ordinary understanding commonly recognized and endorsed by the Kentucky Courts, *and* patently incapable of the consistent application required by the very terms of the exclusion, itself. Again, Western's tortured efforts toward demonstrating the *absence* of patent error has only served (and with no surprise to us) to confirm its *presence*.

II

By way of a second, "restated" question, Western (again, understandably) endeavors to construct some *other* basis for the decisions below that might be sufficient. In a nutshell(Brief in Opposition, p 2 - 3, 9), the insurer insists that a broad "release" appearing in the antecedent settlement served to trigger one of the prohibitory clauses in its policy (one requiring a determination of its insured's "legal liability"). In ostensible support, Western provides a significantly edited recitation of this release, as demonstrating it's purported, expansive breadth.

Here, it would actually be sufficient to merely note two things: that just as Western failed to interpose "release" as an affirmative defense [as required under FRCP 8 (c)], its current offering fails to provide an *argument* in support of this additional, "restated" question. Beyond that, however, Western's recitation and expansive description of the

"release" language in question features and hinges on the same, unfortunate editing it employed for the same purpose in proceedings before the Sixth Circuit. *Appellees Brief, p. 9*. More completely stated (and with the language excised by Western being italicized for emphasis and identification), the relevant provision actually read, "*That except as to the various conditions and considerations specifically set forth herein*, [the Chamber] is hereby fully released and discharged... from any obligation or liability respecting the occurrence aforementioned." *Apx,p. 44 a*.

This, and other details, should place matters in proper perspective. Like virtually any other settlement (and, indeed, those commonly utilized by liability insurers), this instrument merely made it clear that the considerations being received in compromise were limited to those specifically enunciated therein, and accomplished this end by providing a release of any claim *beyond* that. Likewise (and, again, as is customary), the instrument recited language to the effect that its terms did not constitute an admission of liability by the settling defendant, this instead being denied. Conversely, *none* of this served to negate the considerations received from the Chamber and enunciated therein *or*, more specifically, foreclose enforcement of the monetary terms provided therein against the Chamber. This last, instead, was accomplished by an entirely appropriate "covenant not to enforce", and paired with an equally proper assignment of the Chamber's rights. See discussion, *Petition for Writ of Certiorari, p. 4 - 6, fn. 5, infra.*

Ultimately, then, Western's espoused "position" in this regard (insofar, that is, as this *can* be discerned in the absence of a supporting argument) reduces itself to both the absurd and the discredited: (1) that a material distinction is to be drawn between compromises drawn in "settlement" and

"agreed judgment" form, and (2) that an offending insurer can hide behind prohibitory clauses contained in its policy so as to effectively frustrate settlement by its wrongfully abandoned insured. The former of these two notions was specifically rejected in *Burgess vs. Willett,* 311 Ky.745, 225 SW 2nd 315 (1949), holding (not surprisingly) that an agreement drawn in "agreed judgment" form remains a settlement between the parties. As to the second of these propositions (that an insurer-in-breach may demand ongoing compliance with "after trial" and other prohibitory clauses contained in its policy), this, too, has been clearly rejected in *St. Louis Dressed Beef & Provision Co. vs. Maryland Casualty Co.*, 201 US 173 (1906), and, likewise, in both *Cincinnati Insurance Company vs. Vance*, 730 SW2nd 521 (Ky. 1987) and *Medical Protective Ins. Co. of Fort Wayne, Indiana vs. Davis*, 581 SW2nd 25 (Ky.App. 1978). As both of the latter decisions make clear, the defenses available in Kentucky to an insurer-in-breach, and respecting its liability regarding any "result" obtained in the underlying claim, are **not** composed of fraud, collusion, an absence of coverage **and** either a trial of the underlying merits *or* protection under prohibitory clauses contained in it's policy. Instead, these are explicitly limited to only the *first three* just mentioned, *two* of which (fraud and collusion) Western eschewed by way of its original and amended pleadings herein.

In short, insofar as Western's denial of coverage *was* in error (which *should* be beyond doubt), it *has* no further, viable defense to enforcement of the underlying agreement. As this necessarily implies, there is *also* no alternative basis upon which the decisions below may be sustained. In a larger sense, then, Western's "mistake" lies *not* in failing to present an argument in support of its corresponding, "restated" question, but in posing the latter (and based, again, on a distortion of the "release" provision in question).

III

We have no intention to further bandy words with Western concerning the similarities between the circumstances here and those deemed sufficient to merit review in *State Farm Mut. Auto. Ins. Co. vs. Campbell*, 538 US 408 (2003). Instead, we'll be direct.

Again (and notwithstanding Western's efforts to either reference *one* release never executed by or on behalf of the decedent, *or* expand *another* one contained in the underlying settlement), the material facts are undisputed. Likewise, the controlling law, as it pertains to the construction of Western's exclusion, is clear and well established as such in virtually every jurisdiction. Further (and, again, as in *Campbell*), the issue presented is "neither close nor difficult", and the error patent. Similarly, the impact of that error on those seeking relief has been significant, if not moreso. Finally, because that error concerns both a common policy provision *and* the application of principles widely prevailing, both the importance of the issue presented, to the insured public at large, and the potential of that error being repeated, are more than apparent.[3]

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[3] Western's bald insistence to the contrary, in this last regard, appears to be one properly translated into either (1) an unenforceable promise by this *particular* insurer (as opposed to the hundreds of others) that it has no intention of duplicating the erroneous denial of coverage visited upon the Jessamine County Chamber of Commerce, *or* (2) that it has no expectation that *another* court will be nearly as receptive to the flawed arguments it so successfully advanced below. Either way, this is strange support, indeed, for the proposition that the Petition presented should be *denied*.

In this context, there's also no difficulty in reducing Western's espoused position to its unadorned essentials. On the one hand, the insurer eagerly embraces the proposition that a grievous denial of due process occurs when (as in *Campbell*) a state law, constitutionally infirm in some other respect, is applied to the substantial detriment of a corporate insurer. Simultaneously, however, Western urges that no such blemish is to be found when (as *here*) a Court fails to apply *valid* state law, but does so to the significant detriment of an *insured* (and/or its assignees). In *those* instances, it urges, due process considerations become limited to those concerning "notice and opportunity for hearing". Inasmuch as no such distinction exists, Western's espoused position reduces itself to little more than the proposition that such injury, and the patent error producing it, are only worthy of this Court's attention when they operate to the detriment of such an insurer. This, clearly, hardly requires response.[4]

In any event, even we recognize that this Court's intervention must hinge on something more than the outcome of a debate focused merely on characterizing the nature of the

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[4] If this characterization seems unduly harsh, we only remind the Court of that which is made clear in the preceding pages: that Western's abortive efforts to bolster the *propriety* of the unprecedented rulings below, and offered (like the latter) in the absence of supportive authority, has only served to confirm the *opposite*. Accordingly, it's further pronouncements in the latter pages of it's brief represent merely an insistence that *it* should be permitted to *retain* the benefit of that error. By the same token, then, it's not inaccurate to say that *if* Western *is* inclined to "restate" the *real* issue presented, it might have done so with far greater clarity: "Whether the patent error below, to the benefit of this insurer, should be ignored and preserved?"

error below.[5] Conversely, however, mere pronouncements, exalting the "rule of law" as inviolate, mean nothing *unless* the mechanisms necessary to the preservation of such a principle remain within the reach of an aggrieved litigant. Plainly, where such an error occurs at the *Circuit* level, there *is* no avenue of relief therefrom, *except* by way of that which leads to *this* Court's doorstep.

CONCLUSION

Again, we request that the Petition in this matter be granted.

Respectfully submitted,

Hon. Max D. Picklesimer
333 W. Main St.
Suite 1640
Lexington, Kentucky, 40507
(859) 230 - 9206

Hon. Samuel E. Davies
Samuel E. Davies, PSC
230 Knox St.
Barbourville, Kentucky
(606) 546 - 5196

Hon. Howard O. Mann
Law Offices of Howard O. Mann, PSC
104 N. Kentucky Ave
Post Office Drawer 1344.
Corbin, KY 40702.
(606) 528 - 0616

Counsel for Petitioners

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[5] Western's predictable reliance on Sup.Ct. R.10 is misplaced. By the very terms of that rule, it's enunciated criteria, while important, stop short of being exhaustive. Very simply, it's provisions do *not* provide the Circuits with immunity respecting patent errors of *any* specie.